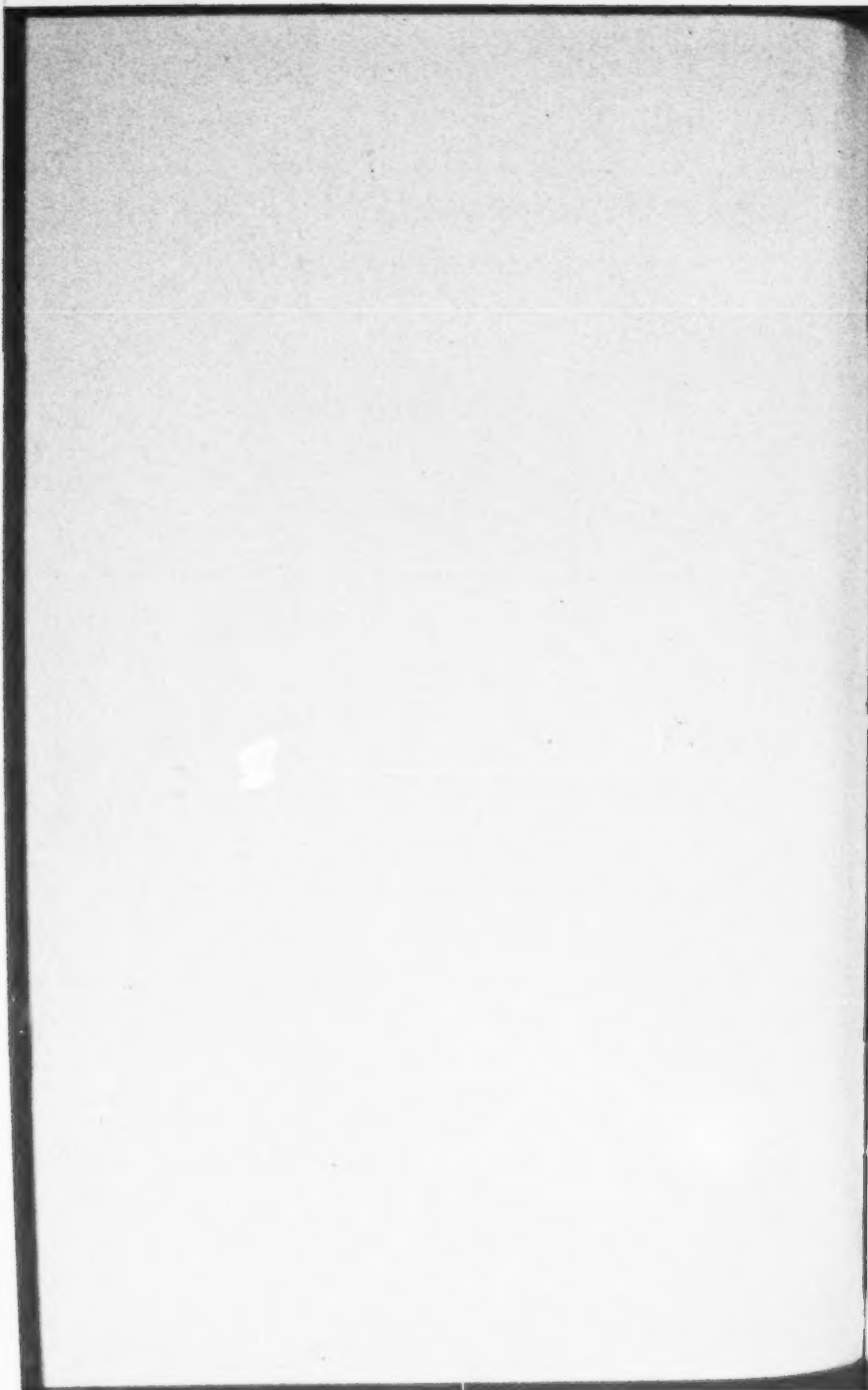

In the Supreme Court of the United States

OCTOBER TERM, 1904.

AH SIN,

Plaintiff in Error,

vs.

GEORGE W. WITTMAN, as Chief of Police of the City and County of San Francisco, State of California,

Defendant in Error.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

STATEMENT.

The printed record of this case now before the Court is both defective and untrue. It is defective in that it omits to contain the most important document on file in the Habeas Corpus proceedings, from the judgment in which this Writ of Error is prosecuted. That document is the Return of the Defendant in Error to the Writ of Habeas Corpus issued to him by the Superior Court. The Return is the most important document in the proceedings, because under the California law it is the pleading around which the whole proceeding re-

volves, and upon the validity and truth of which the legality or illegality of the detention of the prisoner depends. The Return is in the following language, namely:

"In the Superior Court of the City and County of San Francisco, State of California.

"Ex Parte Ah Sin (on Habeas Corpus)—No. 15,198.

"State of California,

"City and County of San Francisco—ss.

"I, George W. Wittman, Chief of Police of said City "and County of San Francisco, acting in obedience to "the Writ of Habeas Corpus issued herein, by said "Honorable Court, do here and now respectfully re- "turn and show that I am unable to produce the body "of the Ah Sin; he, the Ah Sin, having been released "on bail, a true copy of the order of discharge on bail "is hereto attached.

"I would further return and show that on the 25th "day of January, A. D. 1904, the said Ah Sin was ar- "rested in the actual commission of the offense of vio- "lating the provisions of Sections 2 and 3 of Order 937 "of the Board of Supervisors of the City and County "of San Francisco, State of California, true copy of "the complaint in said cause is hereto attached and "made a part of this, my return to said Writ of Habeas "Corpus.

"GEO. W. WITTMAN,

"Chief of Police.

"Dated, San Francisco, Cala., March 22, 1904."

It further appears from other documents annexed to the Return that on the day preceding its filing, the prisoner was released on bail, and that therefore, when the Return was made and the Hearing had by the Court, the prisoner was not in actual custody and was not being restrained of his liberty. This entire Return has been omitted from the record filed by plaintiff in error.

Besides this defect, the record as filed presents a false and untrue statement of the case. There was no stipulation entered into by the District Attorney agreeing that the facts were true as stated in the petition for Writ of Habeas Corpus filed by the Plaintiff in Error. Counsel tries to make this appear from a finding inserted in the judgment of the Court. No such stipulation was entered into, and the facts stated in the petition for Writ of Habeas Corpus were not admitted to be true, and are not true. It is not true, and it was not so stipulated, that the Plaintiff in Error was adjudged guilty by the Police Magistrate of being a visitor to the premises described in the record, "although he visited the same innocently and for a lawful purpose, etc." (Record, p. 8). It is not true, and it was not so stipulated, that the ordinance here in question "is enforced "solely and exclusively against persons of the Chinese "race, and not otherwise" (Record, p. 9). It is not true, and it was not so stipulated, that the Federal questions which are now sought to be presented to this Court were submitted and argued before the Police Magistrate who convicted plaintiff in error (Record,

p. 9). It is not true, and counsel did not so stipulate, that the cause was argued before the Superior Court on the points stated in the petition, and was thereupon submitted to the said Court for decision.

The facts in this case, so far as the proceedings are concerned, occurred as follows: The plaintiff in error was arrested upon a charge of violating the provisions of the ordinance now before this Court. After plea and trial he was adjudged guilty by the Police Magistrate. He then sued out a writ of habeas corpus before the Superior Court. It was thereupon stipulated that these facts were true, and counsel for plaintiff in error expressly stated to the Court that his only object in these proceedings was to have tested the soundness of the decision of the State Supreme Court in the matter of Ah Cheung, and that a formal ruling be made by the Superior Court upon which subsequent proceedings might be taken. (In the Matter of Ah Cheung, 136 Cal., 678, the Supreme Court of the State sustained as constitutional an ordinance similar in all respects to the one here involved.) No other question was presented to the Court, and none of the Federal questions now sought for the first time to be interjected into these proceedings were ever suggested to either the Court or the District Attorney until the filing of the brief by Plaintiff in Error herein.

ARGUMENT.

1. The Return to the Writ of Habeas Corpus, which is omitted from the printed record, but which is quoted at length above, should be taken by this Court as the statement of facts upon which the Superir Court relied in discharging the writ. As was said above, the Return is the essential pleading in the proceedings, and upon the facts stated therein depends the legality or illegality of the detention of the prisoner.

"The party brought before the Court or Judge, on "the return of the writ, may deny or controvert any "of the material facts or matters set forth in the re- "turn, or except to the sufficiency thereof, or allege any "fact to show either that his imprisonment is unlawful "or that he is entitled to his discharge."

Cal. Penal Code, Sec. 1484.

The record does not show that the plaintiff in error either answered the Return or excepted to its legal sufficiency. He is therefore bound b ythe statement of facts contained in it, and those facts are amply sufficient to sustain the judgment of the Superior Court in discharging the Writ. For besides showing the legality of the original arrest, the Return furthermore shows that at the time of its filing and at the time of the Hearing by the Court, the Plaintiff in Error was not in custody and was not restrained of his liberty in any way.

The law of the State of California, similar to that of

other jurisdictions, contemplates an actual restraint or detention as the basis for the remedy of Habeas Corpus.

Cal. Penal Code, Sec. 1473.

"If when the jurisdiction of the Court is invoked the "applicant is not restrained of his liberty by any one, "there is no case for the cognizance of this Court."

Ex Parte Henion, 55 Pac. Rep. (Cal.), 326.

"There must be actual confinement or the present "means of enforcing it to make a case for habeas cor- " pus, and the person who has given bail for his ap- "pearance and has been released from custody is not "entitled to the writ."

Wales vs. *Whitney*, 114 U. S., pp. 571-575.

"The writ of habeas corpus cannot apply or attach "or be resorted to except when the party to be affected "by it is in illegal restraint."

Ex Parte Talbutt, 44 S. W. Rep. (Texas), 832.
Ex Parte Branch, 36 Tex. Crim., 384.

Courts have also refused to take jurisdiction on appeal in Habeas Corpus proceedings where the applicant was originally in confinement, but where, prior to and pending the appeal he had given bail for his appearance and had been released.

Ex Parte Talbutt, 44 S. W. Rep. (Texas), 832.
Ex Parte Walker, 53 Miss., 366.

The fact that the Plaintiff in Error was not in custody at the time of filing of the Return, at the Hearing thereof by the Court, and that he has never been restrained of his liberty or in confinement at any time since the filing of the petition for the writ, reduces this entire controversy to a moot case, and it is conceivable that counsel perceiving this consequence, omitted the Return from the record.

2. The only matter which was presented for decision by the Superior Court, as shown in the above statement of facts, was, whether or not the decision of the State Supreme Court in the matter of Ah Cheung should be sustained; and if we understand the argument of counsel, it is contended that that decision is erroneous, because under it an innocent or lawful visit to a house such as is described in the ordinance is made criminal. This conclusion is deduced from the fact that the ordinance does not contain any provision with regard to the intent with which the "visit" is made. (Brief of Plaintiff in Error, p. 15.)

Ordinances, similar in this respect to the one here involved, have been construed by the State Supreme Court, and held to be constitutional in the face of attack based upon identically the same ground. In all such cases it has been held that, notwithstanding the generality of the language of the ordinance, no lawful

or innocent act would subject a person to the penalty provided for therein. In other words, it is held that the law will be rationally applied, and that cases of innocence will be excepted from its terms, and that before a valid conviction can be had, the prosecution will be compelled to show, in addition to the fact of the "visit," that something was done by the "visitor," showing a guilty or unlawful purpose, and thus bringing him within the class intended to be denounced by the ordinance.

Citing; *Ex Parte Lorenzen*, 128 Cal., 439.
U. S. vs. *Kirby*, 7 Wall., 482.
Ex Parte McClain, 134 Cal., 111.
People vs. *Mead*, 28 Cal. Decisions, 861.

The last case cited is the latest expression of opinion by the State Supreme Court, and it holds that the prosecution must both allege and prove a guilty purpose though the statute is silent upon the subject of intent.

In this condition of the law there can be no valid conviction of an innocent visitor, even though the ordinance be general in its terms and does not expressly exclude from its operation the cases of persons innocently or lawfully visiting. If therefore, as Plaintiff in Error contends, the evidence taken at his trial showed nothing more than that he was an innocent visitor, his remedy is by appeal from the judgment of conviction, and hence his application for the Writ of Habeas Corpus is without justification in law.

"The Writ of Habeas Corpus does not extend be-
"yond the question or jurisdiction and the validity of
"the process upon its face * * *; the Writ cannot
"be substituted for an appeal for the review of errors
"in the misapplication of the law to any given state of
"facts, or in determining whether the evidence taken
"at the trial was sufficient to bring the case within the
"terms of the ordinance prohibiting the offense
"charged."

Ex Parte Long, 114 Cal., 159.

To the same effect are the following:

Ex Parte Watkins, 3 Pet., 203.
In re Wilson, 140 U. S., 583.
In re Delgado, 140 U. S., 588.

Counsel contends that plaintiff in error is "deprived
"of his liberty without due process of law, in violation
"of the Federal Constitution, because his conviction is
"based upon evidence showing him to be innocent of
"any guilty purpose." Conceding that the evidence does show this, the judgment of conviction being erroneous, would be set aside by the tribunals of the State under the proper proceedings, for, as shown above, the ordinance is neither construed nor applied in such a manner as to permit the conviction of a person innocent of a wrongful intent. There is therefore no Federal question involved, but only a mere error in the application of the law, and the object of the jurisdiction

of this Court in controlling decisions of State Courts is not to correct mere errors.

Remington Paper Co. vs. *Watson*, 173 U. S., 451.
Central Bank Co. vs. *Laidly*, 159 U. S., 111.

3. The other point presented in the brief of counsel is that the ordinance in question is unconstitutional because it is enforced against Chinese only. It may be that as far as is known the Chinese are the only persons who have thus far violated this ordinance, but the statement of counsel is misleading and not true in fact, and no stipulation was ever made admitting its truth. The subject was never even hinted at the Hearing on the Writ of Habeas Corpus, and hence the point involved never presented. The Court will understand that under the California practice the Petition for Writ of Habeas Corpus is not served upon the respondent and constitutes no part of the pleading considered at the Hearing. The point was therefore not before the Court in the pleading; neither was it suggested orally by counsel.

The cases are all unanimous in holding that the Federal question must be presented to and ruled upon by the State Court before this Court will take jurisdiction by writ of error.

"It is well settled law that to give this Court juris-
"diction of a writ of error to a State Court, it must af-
"firmatively appear, not only that a Federal question
"was presented for decision by the State Court, but

"that its decision was necessary to the determination "of the cause."

Eustice vs. *Bolles*, 150 U. S., 361.
Beales vs. *Cone*, 188 U. S., 184.
Howell vs. *Brunswick Co.*, 150 U. S., 440.
Harrison vs. *Morton*, 171 U. S., 47.

4. It is likewise well settled that "though the Fed- "eral question was raised, it must appear that the de- "cision was not or could not have been made under "rules of general jurisprudence, broad enough in them- "selves to sustain the judgment without considering "the Federal question."

Missouri Pac. Railway vs. *Fitzgerald*, 160 U. S., 576.
New Orleans vs. *N. O. Water Works Co.*, 142 U. S., 84.
Delaware City Nav. Co. vs. *Reybold*, 142 U. S., 643.
Chappel Chem. Co. vs. *Sulphur Mines Co.*, 172 U. S., 471.

As to the point made by counsel that the evidence at the trial of plaintiff in error did not show him to be guilty, the judgment of the Superior Court discharging the Writ of Habeas Corpus is sustained by the rule that plaintiff's remedy lay in an appeal and not by Writ of Habeas Corpus; and again, as to that question, and to

every Federal question which might possibly be raised, the judgment of the Superior Court in discharging the Writ is fully sustained and justified by the general rule of law that the applicant must be under actual restraint before he may have recourse to the Writ of Habeas Corpus.

Respectfully submitted,

L. F. BYINGTON,

District Attorney.

I. HARRIS,

Counsel for Defendant in Error.